

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Part 2 of the Commission's)	
Rules for Federal Earth Stations)	ET Docket No. 13-115
Communicating with Non-Federal Fixed)	
Satellite Service Space Stations;)	RM-11341
)	
Federal Space Station Use of the 399.9-400.05)	
MHz Band; and)	
)	
Allocation of Spectrum for Non-Federal Space)	
Launch Operations)	

**COMMENTS OF
MARCUS SPECTRUM SOLUTIONS LLC**

Background

Marcus Spectrum Solutions LLC (MSS) is the consulting practice of Michael J. Marcus, Sc.D., F-IEEE, a retired senior executive from FCC who worked at the Commission nearly 25 years in both the spectrum policy and enforcement areas. His qualifications are well known to the Commission¹. These comments are not being submitted on the behalf of any client and are being submitted purely in the public interest. MSS was an active participant in the *ex parte* rulemaking, Docket 10-43 and the *ex parte* issues raised in this proceeding are closely related to an aspect we raised in that proceeding. These comments only address the *ex parte* policy issues in the NPRM.

¹ FCC Press Release , "FCC Engineer Michael J. Marcus Honored by Institute of Electrical and Electronics Engineers (IEEE)" February 3, 2004, (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243463A1.pdf)

“NTIA Loophole” and Private Sector *ex parte* Information

Paragraph 40 of the NPRM in this proceeding asks:

We invite comment on how we might continue to protect against harmful interference to or from Federal earth station operations in a manner that is consistent with the coordination practice as set forth in the MOU, while at the same time ensuring transparency, fairness, and integrity in the Commission’s decision making process.²

The “transparency, fairness, and integrity in the Commission’s decision making process” requires that parties must be given a fair, public, and timely opportunity to respond to allegations made against them by competitors and other private interests.

In the *ex parte* rulemaking MSS raised concerns about the “NTIA loophole” that permits private parties to funnel their comments through NTIA staff to FCC and avoid the public record, thus undermining the intent of the *ex parte* rules. This practice allows private parties to raise allegations about a pending action that other parties are unaware of and unable to respond to. This issue was discussed in Section V of the MSS Comments in Docket 10-43 which are reproduced in the Attachment. The *Report and Order* in that proceedings mischaracterized the MSS comments and then dismissed the issue stating

Marcus proposed that we delete the exception in Section 1.1204(a)(5) to the extent that it permits the National Telecommunications and Information Administration (NTIA) to discuss with the Commission issues concerning their shared responsibility over spectrum management.³

Despite this characterization in the *Report and Order*, the MSS comments did not suggest or urge the deletion of Section 1.1204(a)(5), as can be seen in the attachment.

² *Notice of Proposed Rulemaking*, Docket 13-115, May 9, 2013 at para. 40

³ *Report and Order*, Docket 10-43, February 2, 2011 at para. 47

Rather, the MSS comments in Docket 10-43 proposed that NTIA cease acting as a covert conduit for private parties seeking to influence FCC in matters that affect both private entities and federal entities. During the pendency of the ultrawideband rulemaking, Docket 98-153, Dr. Marcus repeatedly saw as an FCC staffer multiple attempts of cellular interests and GPS interests to contact NTIA to convey negative allegations about UWB that they intended NTIA to give to FCC off the public record. This was even publicly acknowledged by Assistant Secretary Gallagher in a public forum held at FCC!

Mr. Gallagher said that when he heard a new allegation about UWB from the private sector he immediately contacted a high official in FCC/OET, of course, making no public record of the concern so that the other side could comment on it. While we have no direct evidence, it is very likely that the GPS community repeated this use of the “NTIA loophole” during the recent LightSquared controversy.

The Commission should not tolerate the continued use of NTIA as an *ex parte* run around for well connected private interests. NTIA’s use of the exemption of Section 1.1204(a)(5) should be limited to actual legitimate concerns of federal spectrum users. While technical analyses developed by contractors of federal spectrum users should be considered as also subject to the terms of Section 1.1204(a)(5), allegations from other outside parties should not.

We urge FCC to reach an agreement with NTIA that states that NTIA and IRAC members will promptly report to the docket file any communication from any party outside the federal government that seeks to influence the outcome of an ongoing FCC proceeding subject to *ex parte* rules. The only exception should be analyses done by private parties under contract to a federal agency.

Section 1.1204(a)(5) in Practice: Need for Clarification

While Docket 10-43 reaffirmed the long standing policies of Section 1.1204(a)(5), we would like to point out that the practice in this area may differ from the spirit of this section. In the recently concluded Experimental License rulemaking, Docket 10-236, there are no comments from NTIA or any other federal agencies.

Section 1.1204(a)(5) now exempts from contemporaneous *ex parte* disclosure:

The presentation is to or from an agency or branch of the Federal Government or its staff and involves a matter over which that agency or branch and the Commission share jurisdiction provided that, any new factual information obtained through such a presentation that is relied on by the Commission in its decision-making process will, if not otherwise submitted for the record, be disclosed by the Commission no later than at the time of the release of the Commission's decision;

Note that only “any new factual information obtained through such a presentation that is relied on by the Commission in its decision-making process” has to be documented at the “11th hour” before the Commission’s action. It is clear that the issues in Docket 10-236 were of great interest to federal spectrum users since much of the spectrum subject to Part 5 licenses has either exclusive Federal Government allocations or is shared with Federal Government allocations. Under the provisions of the FCC’s Memorandum of Understanding with NTIA⁴ this action was coordinated with NTIA. It is frankly hard to believe that NTIA had no comments on this rulemaking. A more likely explanation for the lack of NTIA comments in this Docket is a very narrow interpretation of this phrase in Section 1.1204(a)(5): “any new factual information obtained through such a presentation that is relied on by the Commission in its decision-making process”.

Thus if the Commission wishes to ensure “transparency, fairness, and integrity in

⁴ FCC/NTIA Memorandum of Understanding, January 31, 2003 (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-230835A2.pdf)

the Commission's decision making process" we urge the Commission to reconsider its apparent interpretation of Section 1.1204(a)(5) and require an *ex parte* submission by NTIA "no later than at the time of the release of the Commission's decision" contain any substantive comments NTIA or other federal agencies made in the coordination process.

Conclusions

MSS thanks the Commission for raising the issue of "transparency, fairness, and integrity in the Commission's decision making process" in this proceeding. These comments raise issues about the continued use of the "NTIA loophole" by private parties to avoid transparency in proceedings subject to *ex parte* rules and the fact that the actual practice in observance of Section 1.1204(a)(5) may not be what was intended when the rule was adopted. MSS hopes the Commission improves its transparency by addressing these concerns in this proceeding.

A handwritten signature in dark ink, appearing to read "Michael J. Marcus", enclosed within a thin rectangular border.

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Attachment

From MSS Comments in Docket 10-43:

V. The Need to Work with NTIA to End the “NTIA Loophole”

The “NTIA Loophole” is an insidious evasion of the *ex parte* rules that exploits the present exemption given to NTIA under §1.1204(a)(5) and only applies to spectrum rulemakings that affect spectrum used by the Federal Government. But as we have written elsewhere⁵ private parties have learned how they can whisper points in their favor to NTIA and then get NTIA to present these viewpoints to FCC decision makers with a timely trace on the public record that can be rebutted. In a public meeting at FCC in around 2003, Assistant Secretary Gallagher, head of NTIA, acknowledged that he did so and found nothing wrong with it. Indeed it is perfectly legal at present. However, it vitiates the transparency goal of these rules when used to hide private party presentations.

The solution to this problem is to urge NTIA to file in the public record any outside contact with non-federal entities presenting information they want NTIA to forward to FCC in an ongoing rulemaking subject to *ex parte* procedures. (Entities that are contractors performing spectrum management studies for NTIA or agencies using spectrum under NTIA assignments should continue to be exempt from such procedures.)

⁵ See <http://spectrumtalk.blogspot.com/2006/06/transparency-at-fcc-ntia-ex-parte.html>